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Uniform Personal Property Security Legislation for Australia -Constitutional Issues

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Abstract
This paper considers the constitutional issues involved in implementing, in all the States and Territories, the proposals contained in the draft Bill for a Personal Property Security Act.

Keywords
personal property security law, constitution, Personal Property Security Act, PPSA

UNIFORM PERSONAL PROPERTY SECURITY LEGISLATION FOR AUSTRALIA - CONSTITUTIONAL ISSUES

by

Dennis Rose*

This paper considers the constitutional issues involved in implementing, in all the States and Territories, the proposals contained in the draft Bill (the "draft Bill") for a *Personal Property Security Act* (the "Security Law").

THE DRAFT BILL

The draft Bill is divided into the following Parts:

Part 1: Preliminary (including definitions and provisions on applicable laws).

Part 2: Validity and attachment of personal property security interests ("security interests"), and rights of parties to security agreements.

Part 3: Protection of security interests and priorities.

Part 4: Establishment of a registry and the registration[1] of security interests.

Part 5: Rights and remedies on default.

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[1] The expression "registration" in this paper will include electronic filing.

Part 6: Miscellaneous matters, including consequences of non-compliance and consistency with lands titles and consumer protection legislation.

The draft Bill is not expressed as a Bill for enactment by any particular legislature -- Commonwealth, Territory or State.

In this paper, "Territory" will be confined to the "self-governing" Territories - ie, the Australian Capital Territory (ACT), the Northern Territory and Norfolk Island. In the absence of Commonwealth legislation to the contrary, the provisions of the law in force in Western Australia would be applied in Christmas Island and the Cocos (Keeling) Islands[2], and the provisions in force in the Northern Territory and the ACT would be applied in the Ashmore and Cartier Islands and the remaining Territories respectively.[3]

THE MAIN CONSTITUTIONAL ISSUES

The main constitutional questions are the following:

- Could the legislation be enacted --
    - by the Commonwealth alone?
    - as some form of co-operative scheme – ie a combination of Commonwealth and State legislation, or Commonwealth, State and Territory legislation, or State and Territory legislation?
- If there is more than one constitutional option, what are the comparative advantages and disadvantages?

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2 *Christmas Island Act 1958*, s 7 and *Cocos (Keeling) Islands Act 1955*, s 7A, respectively.

3 See the various Commonwealth Acts for the government of those Territories.

THE OPTIONS

The Commonwealth's legislative powers, particularly those with respect to overseas and interstate trade and commerce, corporations (foreign, trading and financial) and banking, would support the enactment of the Security Law with regard to very many kinds of transactions.

However, apart from the "reference" power in s 51(xxxvii) of the Constitution,[4] the Commonwealth's powers would fall short of enabling the Security Law to be enacted as a single comprehensive national law. For example, the Commonwealth lacks power to deal with wholly intra-State transactions not involving corporations within s 51(xx) of the Constitution or other corporations or individuals (eg aliens) falling within the limited subjects of Commonwealth power.

The "reference" power in s 51(xxxvii) would enable the enactment of a Commonwealth law applicable nationally if one or more States gave the Commonwealth references in appropriate terms and the other States "adopted" the Commonwealth legislation enacted on the basis of the references.

Hence (disregarding the theoretical option of a constitutional alteration) there are three main options as follows:

Option (1): **A single Commonwealth Act**

Such an Act would apply –

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[4] Section 51(xxxvii) of the Constitution empowers the Parliament to make laws "with respect to ... [m]atters referred to the Parliament of the Commonwealth by the Parliament of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

- in each State under s 51(xxxvii) of the Constitution; and
- in each Territory under s 122 of the Constitution.

Option (2): **The simplest form of co-operative scheme**

Under this scheme, if any Commonwealth legislation applied in the States it would be limited to provisions for the establishment and operation of the registry ("registry provisions").

Apart from registry provisions, the scheme would comprise:

- in each State – only State legislation; and
- in each Territory – Commonwealth or Territory legislation.

Option (3): **A more elaborate form of co-operative scheme**

Under such a scheme, if any Commonwealth legislation applied in the States it would include not only registry provisions if the registry was established by the Commonwealth, but also the other provisions of the Security Law to the extent that they could be enacted by the Commonwealth under all of its legislative powers, or under selected ones such as its financial corporations and banking powers.

Apart from registry provisions, the scheme would comprise -

- in each State – a combination of Commonwealth and State legislation; and
- in each Territory - Commonwealth or Territory legislation.

OPTION (1): A SINGLE COMMONWEALTH ACT

As indicated above, this option could be implemented only by an exercise of the Parliament's "reference" power in s 51(xxxvii) of the Constitution[5] and its power in section 122 to make laws "for the government" of any Territory.

Accordingly, the Commonwealth could enact the Security Law in a single Act, applying in all States and Territories as follows:

- in each State, under s 51(xxxvii) of the Constitution if (but only if) –
  - every State gave an appropriately worded reference to the Commonwealth; or
  - each of one or more States gave such a reference and the remaining States "adopted" the Commonwealth legislation; and
- in each Territory, under s 122 of the Constitution.

The wording of the State references

State references of "the matter of security interests in personal property" would enable the Commonwealth Parliament to enact any law that could be characterised as a law "with respect to" that matter.

That concept is a very wide one, and extends to all matters "incidental" to the main subject, including all provisions that could "reasonably be considered to be appropriate and adapted"[6] to giving effect to the main provisions. State references in those terms would, of course, fully

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5 Above n 4.

6 See, for example, *Richardson v Forestry Commission* (1988) 164 CLR 261, 303, 311-312, 336, 346.

support the Commonwealth's enactment of an Act containing provisions in, or substantially in, the terms of the draft Bill.

Such references would also enable the Commonwealth to enact any amendments to the legislation, or to enact any separate Acts, that could be characterised as laws "with respect to" the referred matter.

If any States considered such references to be too broad, they might insist on narrower references and legally non-binding[7] agreements such as the agreement made for the purposes of the *Corporations Act 2001*.[8]

Without knowing what might be the concerns of any State about a Commonwealth power "with respect to security interests in personal property", it is impossible to suggest any alternative form of words for the references.

Could the existing corporations law references be used for the Security Law?

For the purposes of the *Corporations Act 2001* (Cth) the States were unwilling to give references simply of the matter of "corporations". Instead, the basic references[9] were limited to the enactment of Acts substantially in the terms of the proposed Commonwealth *Corporations Bill 2000* and *Australian Securities and Investment Commission Bill 2000*.

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[7] The Commonwealth Parliament's power to legislate within the scope of a reference could not be legally restricted by any agreement with a State or States.

[8] The Corporations Agreement, which provided for a Ministerial Council for Corporations to consider proposed Commonwealth amendments.

[9] The *Corporations (Commonwealth Powers) Act 2000* of each State.

As to amendments the references are limited to the enactment of express amendments, made to the original Acts as amended from time to time, with respect to the "formation of corporations", "corporate regulation" and the "regulation of financial products and services". Moreover, these references are subject to a long list of exceptions relating to industrial relations and certain other matters.

The references of the matter of the "regulation of financial products and services" extend beyond the provision of such products and services by corporations.[10] Thus they support, for example, amendments excluding persons other than corporations from being "engaged in the management of any scheme or market under, through or in which financial products or services are offered to the public."[11] They would support legislation with respect to security interests in personal property in so far as the legislation was "regulation" of financial products and services. However, it is doubtful whether the concept of "regulation" would extend to the provisions of the draft Bill, given that they concern the relationships of parties to voluntary security transactions (including the consequences of voluntary registration) rather than the imposition of any requirements of a "regulatory" nature. There are similar doubts concerning the existing references of the matter of "corporate regulation".

For these reasons the existing State references would fall short of what is needed for a comprehensive Security Law.

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[10] See the *Financial Services Reform Act 2001* (Cth).

[11] Section 6(2)(b) of the *Corporations (Commonwealth Powers) Act* of each State. There is some doubt whether such provisions would be supported by the corporations power in s 51(xx) of the Constitution: see *R v Hughes* (2000) 202 CLR 535, 556 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Problems of "adoption" by a State instead of a reference

The problem with one or more of the States "adopting" legislation enacted pursuant to a reference from another State is that amendments to the Commonwealth legislation would probably not apply in an adopting State unless the amendments themselves were separately adopted by that State after their enactment by the Commonwealth. Hence this model would be more cumbersome than one in which all of the State gave references in the same terms, in which case the Commonwealth Parliament could amend the legislation from time to time (within the scope of the references) without further action by the States.

Accordingly, the preferable model in the States under s 51(xxxvii) requires a reference (in adequate terms) from each State, as was done to enable the Commonwealth to enact the *Corporations Act 2001* (Cth).

Relationship between the Commonwealth Act and other legislation

Unless otherwise provided by Commonwealth legislation, a Commonwealth Security Law would override any inconsistent State legislation[12] or Territory legislation.

Moreover, in the absence of a contrary intention in Commonwealth legislation, a Commonwealth Security Law would, also override any inconsistent earlier Commonwealth legislation such as the *Corporations Act 2001* and the *Patents Act 1990*,[13] and would continue as an exception from later more "general" legislation.[14]

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[12] Constitution, s 109.

[13] Other Commonwealth legislation dealing with personal property securities includes the *Trade Marks Act 1995*, the *Designs Act 1906*, the *Life Insurance Act 1995*, the *Shipping Registration Act 1981*

Inconsistency with any other Commonwealth legislation such as the *Corporations Act 2001* or the *Patents Act 1990* could be avoided by the inclusion of appropriate provisions in the Commonwealth Security Law itself or in other Commonwealth legislation. The "pulling back" of other Commonwealth legislation so as to avoid inconsistency with the Security Law would be an exercise of whatever Commonwealth powers supported that other legislation, such as the patents power.

Jurisdiction of courts and tribunals

Jurisdiction in matters arising under the Commonwealth legislation in its application in the States would be federal jurisdiction that could be vested in the Federal Court of Australia, the Federal Magistrates Court or other federal court. If any special federal court were created for the purpose, its judges would have to be given tenure until the age of 70, as required by s 72 of the Constitution.

Unless the Commonwealth vested the jurisdiction exclusively in federal courts,[15] State courts would have concurrent jurisdiction under the *Judiciary Act 1903* (Cth).[16] However, since the

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and the *Air Navigation Act 1920*: see Craig C Wappett and David E Allan, *Securities over Personal Property* (Butterworths, 1999), chapter 2.

[14] *Generalia specialibus non derogant:* see Pearce and Geddes, *Statutory Interpretation in Australia* (5th ed. 2001), para 4.30.

[15] Pursuant to s 77(i) and (ii) of the Constitution.

[16] See, in particular, s 39(2) enacted pursuant to s 77(iii) of the Constitution.

power to be exercised would clearly be judicial power, it could not be vested in State tribunals that are not "courts".[17]

There have been strong suggestions that the legislation should enable proceedings to be brought by consumers in specialist State tribunals such as the Consumer, Trader and Tenancy Tribunal of NSW.[18] However, this could only be done with tribunals that (whatever they may be called) are "courts" within the meaning of ss 71 and 77(iii) of the Constitution. There can often be considerable uncertainty whether particular State tribunals are "courts". However, the Consumer, Trader and Tenancy Tribunal of NSW appears clearly enough not to be a "court". The members deciding a matter need not include a person with legal qualifications.[19] The Tribunal is not bound by the rules of evidence, may inform itself in any manner that it thinks fit subject to the rules of procedural fairness and must act with as little formality as the circumstance of the case permit and according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.[20] Before making an order, the Tribunal must use its best endeavours to bring the parties to a settlement acceptable to all parties.[21] These features "point strongly"

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17 *Waterside Workers' Federation v Alexander* (1918) 25 CLR 434; *Silk Bros Pty Ltd v State Electricity Commission* (1943) 67 CLR 1.

18 Established by the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW).

19 Ibid ss 6, 8 and 11.

20 Ibid s 28.

21 Ibid s 54(1).

against the Tribunal being a "court".[22] The judicial nature of the Tribunal's functions under the proposed law would point in the other direction. However, this would be offset by the fact that, under other legislation, the Tribunal has functions that are not judicial in nature.[23]

A Commonwealth registry

According to the draft Bill, a registrar would be appointed by "the minister", and the registrar would have power to appoint "deputy registrars" (clause 48). The draft Bill does not provide for registry staff or for the administrative structure of the registry.

Under Option (1), there are several alternatives for the establishment, structure and operation of the registry under Commonwealth legislation. There would be no constitutional obstacles.

(a) Establishment

The Commonwealth Act could provide for the establishment and operation of the registry in any State[24] or Territory, with branch offices anywhere in Australia or overseas.

(b) Administrative structure

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[22] *P v P* ((1994) 181 CLR 583, 634 (McHugh J, referring to *Attorney-General v British Broadcasting Corporation* [1981] AC 326); contrast *NSW Bar Association v Muirhead* (1988) 14 NSWLR 173, and *Taylor v Gordon Frost Organisation Pty Ltd* (1991) 52 IR 401.

[23] Eg under the *Residential Tenancies Act 1987;* see *Re Residential Tenancies Tribunal: Ex parte Henderson* (1997) 190 CLR 410, 448 (Dawson, Toohey and Gaudron JJ), 460-461 (McHugh J), 474-475 (Gummow J), 511 (Kirby J).

[24] Note that the Australian Securities and Investments Commission ("ASIC") has its headquarters in Victoria.

One option would be along the lines of the administrative structure under the *Trade Marks Act 1995* (Cth)[25] for the registration of trade marks. That Act provides for an office called the "Trade Marks Office", a Registrar of Trade Marks and at least one Deputy Registrar. The staff are members of the Australian Public Service, being officers or employees of a Commonwealth Department. The Registrar and other staff, together with the Commissioner for Patents and the Registrar of Designs, are now referred to, for administrative purposes, as "IP Australia" though they are not so named in the legislation. Unlike many other statutory officers, such as the Australian Statistician,[26] the Registrar of Trade Marks does not have powers over members of the staff as if the Registrar were the Secretary of a Department.

On the Trade Marks model, the registry would not be a statutory corporation capable of employing its own staff and holding moneys on its own account. It would thus differ from ASIC, one of whose functions is to register corporations under the *Corporations Act 2001* (Cth).

By comparison with the registry under the Security Law, ASIC has very many more functions, investigative and regulatory, that make it appropriate to be a statutory corporation. Nevertheless, in view of the fact that registration under the Security Law would have effect for the purposes of the State and Territory laws, it might be considered preferable to establish the registry as a body corporate so that it could employ its own staff and receive and hold moneys on its own account.

(c) Finances

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[25] There is a similar administrative structure under the *Designs Act 1906* (Cth) for the registration of designs.

[26] *Australian Bureau of Statistics Act 1975*, s 16(4)(5).

As mentioned above, a registry established on the model of the Trade Marks Office would not be incorporated and would not have its own moneys. Expenditure for its purposes would be made by the Commonwealth out of moneys appropriated by the Parliament for that purpose. Unless provision was made to the contrary, registry officers would constitute a "prescribed Agency" for the purposes of the *Financial Management and Accountability Act 1997* (Cth) and regulations under that Act, and would have power to authorise expenditure.

Fees collected by a registry established on the Trade Marks model would form part of the Consolidated Revenue Fund of the Commonwealth,[27] as would any moneys received from the States and Territories as contributions towards the costs of running the registry.

Even if the registration, search and other registry fees exceeded the reasonable costs of providing the registry services and so were "taxation", they could be imposed by the main Act if it established the registry in a Territory.[28]

If the registry was established in a State, the imposition of fees amounting to "taxation" would need to be imposed by a separate Act. However, legislation simply authorising the imposition of

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[27] Constitution, s 81.

[28] Since they would be imposed under s 122 of the Constitution, they would not be subject to the provisions in s 55 of the Constitution that laws imposing "taxation" must be imposed by an Act that deals only with such imposition, and that any other provisions are void: *Buchanan v The Commonwealth* (1913) 16 CLR 315.

"fees" as prescribed by regulations would be construed as only authorising charges limited to reasonable charges for the registry services.[29]

(d) Judicial review of action by a Commonwealth registry

Officers of a Commonwealth registry[30] would be "officers of the Commonwealth" within the meaning of s 75(v) of the Constitution and so would be amenable to the constitutional writs of mandamus and prohibition and to injunctions. They could be made subject also to Commonwealth statutory remedies.[31] The Commonwealth (in the case of an unincorporated registry) or a registry corporation could also be liable for damages for registry negligence[32] unless the legislation indicated an intention to exclude that remedy. However, it would be desirable to include provisions expressly concerning the extent (if any) to which the Commonwealth or an incorporated registry would be liable.

(f) Administrative review of action by a Commonwealth registry

The Commonwealth legislation could provide for decisions by the registry to be subject to review by a Commonwealth tribunal such as the Administrative Appeals Tribunal.[33]

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29 *General Practitioners' Society v The Commonwealth* (1980) 145 CLR 532, at 562 (Gibbs J, with whom Barwick CJ, Stephen. Mason, Murphy and Wilson JJ agreed on this aspect at 538, 563, 564, 565 and 572 respectively); also 570 (Aickin J).

30 Including those in a Commonwealth registry in a Territory: *Spratt v Hermes (*1964) 114 CLR 226.

31 Eg under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

32 *Municipality of Sorell v Imlach* [1958] Tas S R 76.

33 *Administrative Appeals Tribunal Act 1975* (Cth).

OPTION (2): THE SIMPLEST FORM OF CO-OPERATIVE SCHEME

Under this option, Commonwealth legislation (if any) applying in a State would be limited to registry provisions.

Apart from registry provisions, the legislation would comprise -

- the "primary legislation", enacted by only one State or Territory, or by the Commonwealth for one or more Territories, setting out the full text of the provisions of the Security Law; and

- "application legislation", enacted by each State that did not enact the primary legislation, and by the Territory or the Commonwealth in the case of each Territory (if any) where the primary legislation did not apply of its own force; the application legislation would apply the provisions of the primary legislation by reference – ie without reproducing their full text.

The effect of the application legislation in any State or Territory would be exactly the same as if the applied provisions had been enacted in full by the applying legislature – ie, they would operate as laws of the applying jurisdiction.[34]

The scheme could include legally non-binding agreements to the effect that any amendments would be made to the primary legislation only in accordance with the consent of the other jurisdictions.[35]

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[34] Non-constitutional questions such as the situs of property would be determined accordingly. They are outside the scope of this paper.

The effect of registration

In each State or Territory the primary or application legislation (whichever was in force there) would provide that, regardless of how the registry was established, registration would have effect for the purposes of any of the State or Territory laws under which registration of security interests in personal property was relevant. If it was claimed that an interest had been improperly registered, proceedings to rectify the register would need to be taken under the law conferring the registry functions.

This form of co-operative scheme would be similar to one involving a Commonwealth motor vehicle registry. The Commonwealth could establish and operate the registry for the purposes of the traffic laws of one or more Territories. A State could provide that registration in the Commonwealth registry would be taken to be registration for the purposes of any of the State's laws under which the registration of motor vehicles under the law of the State was relevant.

If, after registration of a security interest, the grantor moved, or relevant property was moved, to another State or Territory, the registration would be recognised for the purposes of the law of that State or Territory without the need for any fresh registration or other action, unless, of course, the legislation made it necessary, for example, to notify changes of location to the registry.

As noted above, Commonwealth legislation might be needed for the purposes of other Commonwealth legislation such as the *Patents Act 1990*. However, Commonwealth legislation concerning the effects of registration would not be needed for the purposes of legislation such as

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[35] Governmental agreements could not bind the legislatures. A State legislature could not bind itself in the absence of State "manner and form" restrictions (cf. *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK)). Nor could Territory legislatures bind themselves unless permitted by Commonwealth legislation.

the *Bankruptcy Act 1968* in so far as issues concerning rights in relation to security interests are determined according to State or Territory legislation and the common law.

Relationship between the State and Territory legislation and inconsistent Commonwealth legislation

A State Act[36] or Territory Act implementing the scheme would not, unless permitted by Commonwealth legislation, be valid to the extent of any inconsistency with some Commonwealth Act (whether earlier or later) such as the *Corporations Act 2001* or the *Patents Act 1990.*

Inconsistency between a State or Territory Security Law and Commonwealth legislation such as the *Patents Act 1990* could be avoided by the inclusion of appropriate provisions in Commonwealth legislation. The "pulling back" of any particular Commonwealth legislation so as to avoid inconsistency with the provisions of the Securities Law applying in the States would be an exercise of whatever Commonwealth powers supported that Commonwealth legislation (eg the patents power). "Pulling back" the Commonwealth legislation in order to avoid inconsistency with the Securities Law in a Territory would be supported by s 122 of the Constitution and other powers supporting the particular Commonwealth legislation

Jurisdiction of courts and tribunals

Under this option, jurisdiction in any class of matters arising under the Security Law in force in a State could be vested by the State in its courts or tribunals, or concurrently in both.

However, unlike Option (1) such jurisdiction could not be vested by the State in any federal courts.[37] This shortcoming, if it is one, could be reduced by Option (3) discussed below.

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[36] Constitution, s 109.

Jurisdiction in matters arising under State provisions could be vested by the Commonwealth in federal courts in matters within certain limited heads of federal jurisdiction.[38] Unless the federal jurisdiction in these matters was made exclusive to federal courts, it would be vested in State courts, including State tribunals if they were "courts" in the constitutional sense, by s 39(2) of the *Judiciary Act 1903* (Cth).

The registry

Under Option (2) the registry could be established -

(a) by the Commonwealth –

(i) in a Territory; or

(ii) in a State; or

(b) by a State in that State.

(c) by a Territory in that Territory.

(a) A registry established by the Commonwealth

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[37] *Re Wakim; Ex part McNally* (1999) 198 CLR 511 ("*Wakim*"); for a critical analysis, see Dennis Rose, "The Bizarre Destruction of Cross-Vesting", in Adrienne Stone and George Williams (eds.), *The High Court at the Crossroads* (Federation Press, 2001), 186-215.

[38] For example, in matters in which the "Commonwealth" was a party, or between residents of different States, or relating to the same subject matter claimed under the laws of different States: cf. Constitution, ss 75(iii), 75(iv) and 76(iv) respectively, read with s 77(i).

Under s 122 of the Constitution, Commonwealth legislation could validly provide for the establishment and operation of a Commonwealth registry in any of the Territories. It would be constitutionally irrelevant that many applications for registration would come from applicants in the States.

Alternatively, a Commonwealth registry could be established and operate in a State for the purposes of Territory laws. The Commonwealth provisions for Territory purposes would be valid laws for the government of a Territory under s 122 of the Constitution, and would have the direct force of law in the States.[39] This would be so despite the fact that the Commonwealth law would have been designed to provide for registration, not only for the purposes of Territory laws, but also for the purposes of State laws. On its face the Commonwealth law need not refer at all to the intention that the States would legislate to provide that registration in the Commonwealth registry would also be effective for the purposes of any State laws. In any event, it is well established that a Commonwealth law is valid if it can be characterised as a law with respect to one subject of Commonwealth legislative power even if it can also be characterised as a law with respect to some other subject.[40]

Branch offices

If the Commonwealth established a registry in a State or Territory for the purposes of the laws of any Territory, it could validly provide (under the Territories power in s 122 of the Constitution) for the operations of branch offices anywhere in Australia or overseas. It would be constitutionally irrelevant that the branch offices would be dealing with many matters concerning only persons and transactions in the States.

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[39] *Lamshed v Lake* (1958) 99 CLR 132.

[40] *The Commonwealth v Tasmania* (*Tasmanian Dams Case*)(1983) 158 CLR 1.

Finances

There would be no doubt as to the power of the Commonwealth Parliament to appropriate moneys for the purposes of the registry, given that it would be established for the purposes of a Territory or Territories.[41] This would be so even though registration would be relied upon, pursuant to the State Security Laws, for purposes extending beyond the Commonwealth's legislative powers.

R v Hughes[42] *would not afflict the scheme*

The High Court judgments in *Hughes* have created vexing problems for co-operative schemes such as the Corporations Law scheme. Those schemes have involved the performance of considerable investigative and other functions under State law, and have been constructed on the basis that those functions should be performed – in some cases exclusively - by Commonwealth administrative authorities such ASIC and the Commonwealth Director of Public Prosecutions. The Corporations Law scheme went further than previous schemes in that it was designed to operate exactly as if the State and Northern Territory Acts and the Commonwealth Act (for the

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41 It would therefore be unnecessary to rely on the view that, even in respect of activities carried on by other persons, the Commonwealth has power to spend money for any purposes it chooses. Cf. *Victoria v The Commonwealth and Hayden* (*Australian Assistance Plan Case*)(1974) 134 CLR 338, 367-369 396 and 417-418, (McTiernan, Mason, and Murphy JJ respectively); contra 360, 371-375 and 412 (Barwick CJ, Gibbs and Jacobs JJ respectively).

42 (2000) 202 CLR 535 ("*Hughes*").

ACT) were one Commonwealth Act, wholly administered by Commonwealth authorities.[43] Such a scheme necessarily involved the conferral of extensive State powers on Commonwealth administering authorities.

The judgments in *Hughes* have created doubts concerning the validity of the conferral by States on Commonwealth authorities of powers and functions that the Commonwealth could not itself have conferred.[44]

However, those problems would not afflict a Commonwealth registry under Option (2). This is because such a scheme would be fundamentally different from the Corporations Law scheme considered in *Hughes* in that it would not involve the conferral of any State powers or functions on the Commonwealth registry.

The only powers and functions needing to be conferred on a Commonwealth registry would be powers and functions for the purposes of one or more Territories. The Commonwealth legislation, for those Territory purposes, would have the direct force of law in the States.[45] The

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[43] The somewhat complex provisions attracted what appears, with respect, to have been some unfair judicial criticism based on an incomplete understanding of the legislation (eg *Hughes* (2000) 202 CLR 535, 562 563, 565 and 579 (Kirby J).

[44] As a result of those doubts, the Corporations Law Scheme was replaced by the *Corporations Act 2001* (Cth) pursuant to a reference from each State for the purposes of s 51(xxxvii) of the Constitution.

[45] *Lamshed v Lake* (1958) 99 CLR 132.

State laws would not need to confer any powers[46] or functions. Instead, they would only prescribe the effect, under State laws, of registration in the Commonwealth registry.

(b) A registry established by a State

Legislation by a State could validly provide for the establishment and operation of the registry in that State for the purposes of the laws of that State.[47] Other States, the Territories (or the Commonwealth for a Territory or Territories) and the Commonwealth (to the extent required in relation to legislation such as the *Patents Act 1990*) could provide that registration would have effect for the purposes of their laws.

The question of the most appropriate structure for a State registry would raise essentially the same issues as those outlined above in relation to a Commonwealth registry. The provisions governing the operations of a State registry could be generally the same as those for a Commonwealth registry. Of course, a State would need to comply with requirements under its own laws on matters such as the finances of a registry. Any judicial or administrative review would be as provided by State law.

Branch offices

A State could establish branch offices in another State or in a Territory with power, under the legislation of the establishing State, to register security interests for the purposes of that State's laws. However, legislation of the establishing State could not, as such, be enforced in another

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[46] Any criminal investigations or prosecutions concerning alleged breaches of Commonwealth law in relation to the operation of the registry could be handled under general Commonwealth procedures.

[47] State establishment of a registry in another State can be disregarded here.

State, or in a Territory, against branch officers in respect of conduct there. If considered necessary, legislation of the State or Territory where a branch office was located could have legislation applying the relevant provisions of the establishing State's legislation so as to make those provisions enforceable in the State or Territory where the branch office was located. However, such legislation might not be necessary. For example, fraud by staff of a branch office could be prosecuted under the general criminal law of the State or Territory where the fraud occurred, or under the laws of the establishing State or Territory in that State or Territory. Some special provisions might be needed in the laws of the State or Territory where the branch office was located.[48]

(c) A registry established by a Territory

The position would correspond to that outlined above concerning a State registry.

OPTION (3): MORE ELABORATE FORMS OF A CO-OPERATIVE SCHEME

Under these forms the position concerning the establishment and operation of the registry by the Commonwealth, a State or Territory would be the same as under Option (2).

Apart from the registry provisions, the theoretical variations under Option (3) are as follows:

(a) In each State -

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[48] The *Jurisdiction of Courts (Cross-vesting) Acts 1987* of each State would not apply to criminal matters. Moreover, in relation to civil proceedings those Acts are subject to uncertainties having regard to remarks in *Wakim* (1999) 198 CLR 511, 573 (Gummow and Hayne JJ, with whom Gleeson CJ and Gaudron J agreed at 540 and 546 respectively).

(i) Commonwealth legislation -

(A) to the full extent of the Commonwealth's constitutional powers;[49] or alternatively

(B) only to the extent of selected constitutional powers, such as the banking and corporations powers.

(ii) State legislation –

(A) to operate concurrently with the overlapping Commonwealth legislation, or alternatively

(B) only to "fill in the gaps" left by the Commonwealth legislation.

(b) In each Territory – Commonwealth or Territory legislation.

In all or any of the Territories Commonwealth legislation under s 122 could fully implement the scheme, and a self-governing Territory could implement the legislation for itself. A theoretical alternative would be to follow the model of sub-option (a)(i)(B) and have Commonwealth legislation applying in the self-governing Territories only to the same extent as it would apply in the States. However, that would afflict administration in such a Territory with the constitutional demarcation problems outlined below.

The only respect in which any form of Option (3) might be seen as having an advantage over Option (2) is that jurisdiction in matters arising under the provisions could, in so far as they

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[49] Including s 51(xxxvii) in the case of any State willing to give a reference, or to adopt Commonwealth legislation enacted pursuant to a reference from another State.

applied as Commonwealth law, be vested in federal courts as well as (or instead of) State courts, though not in State tribunals that were not "courts". (As mentioned above, subject to limited exceptions,[50] jurisdiction in matters arising under State legislation cannot be vested in federal courts.)

The only advantage over Option (1) is that, as outlined below, the various forms of Option (3) would enable jurisdiction to be given to State tribunals that are not courts.

The effect of registration

As with Option (2), the State, Territory (or Commonwealth) and Commonwealth legislation would provide that registration would have effect for the purposes of any of the laws of the State, Territory or Commonwealth respectively under which registration of security interests in personal property was relevant. Option (3) would therefore not require any conferral of State functions on a Commonwealth registry. Hence, as with Options (1) and (2), the *Hughes* problems would not arise.

Jurisdiction of courts and tribunals

Jurisdiction in matters "arising under" the Commonwealth provisions[51] could be vested[52] in federal courts and in State courts and tribunals that are "courts" in the constitutional sense.

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[50] Above n 38.

[51] These would include, not only matters where the plaintiff's claim was based on the legislation, but also matters where the legislation was raised as a defence to a claim: *Felton v Mulligan* (1971) 124 CLR 367.

Jurisdiction in matters arising under State provisions could be vested in State "courts" or tribunals that were not "courts" (or both), except in matters within s 75 or s 76 of the Constitution if vested by the Commonwealth exclusively in federal courts.

If the State provisions operated concurrently with the Commonwealth ones, the Commonwealth legislation could permit State tribunals to deal with proceedings brought there, and provide that, upon the institution of proceedings in such a tribunal, any rights under the Commonwealth legislation would be extinguished so that claims in respect of matters in the tribunal proceedings could not be brought in any court.[53]

Objections to sub-option (a)(i)(A) above – ie Commonwealth legislation to the fullest extent of the Commonwealth's constitutional powers

Such legislation would give rise in a federal court to constitutional arguments concerning the limits of any of the Commonwealth's legislative powers. Similarly, such demarcation issues could arise in any State court if federal courts had been given exclusive jurisdiction in matters arising under the Commonwealth legislation, or if the State legislation followed sub-option (a)((ii)(B) above and so merely "filled in the gaps" left by the constitutionally limited Commonwealth provisions.

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[52] The federal courts would also have any accrued jurisdiction, which is jurisdiction to determine issues arising out of the same factual matrix as proceedings within any other federal jurisdiction of the court: see, eg *Wakim* (1999) 198 CLR 511, 563 (McHugh J), 583-588 (Gummow and Hayne JJ).

[53] Including the High Court. Since the rights under the Commonwealth law would be defeasible in that way from the outset, the extinguishment would not involve an "acquisition of property" so as to create problems under s 51(xxxi) of the Constitution in the absence of "just terms".

Under sub-option (a)(i)(A) the Commonwealth legislation would need to be drafted in such a way that it would be characterised as a law "with respect to" each and every subject of Commonwealth legislative power. This has been recently attempted in Commonwealth provisions seeking to enable legislation to be "read down" and held valid to the full extent of Commonwealth power. Those provisions state that it is "the intention of the Parliament to rely on all powers available to it under the Constitution".[54]

Some encouragement for this approach was given by the judgments in *Hughes* where the High Court read down certain provisions of the *Corporations Act 1989* (Cth) so that, even if its provisions did not validly apply to all situations within their literal scope, they were valid in their application to particular transactions, such as those in *Hughes*,[55] that fell within the scope of the external affairs, overseas trade or other powers.

The reading down in *Hughes* went beyond what had been done in the precedents relied upon in the joint judgment.[56] In each of those precedents the legislation was clearly intended to be an exercise of the defence, external affairs,[57] banking and "race " powers respectively. The legislation

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[54] For example, the *Agricultural and Veterinary Chemicals Act 1994* (Cth), s 18, which purports to permit State laws corresponding to a Commonwealth law for the ACT to confer duties, functions and powers on Commonwealth tribunals, bodies and officers, and states that the Parliament's intention is to rely on all the powers available to it.

[55] (2000) 202 CLR 535, 556-557 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[56] Loc cit nn 78-80.

[57] In this respect, the actual decision in *Hughes* could perhaps be justified on the basis that there were provisions expressly applying the legislation to acts outside Australia: Corporations Law, section 9,

was read down so as to confine it within limits of a law characterised as one with respect to the subject matter of the relevant power[58] or to make it compatible with Chapter III.[59] The reading down in *Hughes* must have been based on the unstated discovery of an implication that the legislation was intended to apply to any particular conduct if legislation confined to that conduct would be valid, and so was intended to operate either as a "seamless web" of provisions or not at all. Hence *Hughes* seems to give some support for reading down provisions where Parliament has expressed an intention that it is relying on all the powers available to it. However, this might well not be enough to enable the legislation to be characterised as a law with respect to each and every subject of Commonwealth legislative power. Its prospects of success would be better if it followed what was actually done in *Hughes* by providing that the legislation was intended to apply in any case where the legislation would be valid if it had been expressly limited to the particular circumstances of the case. There seems no reason in principle why such a provision[60]

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defining "prescribed interests" in section 1064(1): see *Hughes* (2000) 202 CLR 535, 546-547, 546-547 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

58 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, *Victoria v The Commonwealth* (the *Industrial Relations Act Case*) (1996) 187 CLR 416, 501-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Bourke v State Bank of NSW* (1990) 170 CLR 276 291; the validity of legislation seeking to rely on all the powers of the Parliament was left open in *Dingjan v Wagner* (1995) 183 CLR 323, 340-341 (Brennan J), 348-349 (Dawson J), 355(Toohey J), 366 (Gaudron J with whom Mason CJ agreed at 333), and 372 (McHugh J).

59 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, at 10, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).

60 Eg s 7A of the *Industrial Relations Act 1986* (Cth), the validity of which was left open in *Dingjan v Wagner* (1995) 183 CLR 323.

should not be effective in relation to "non-purposive" powers since it could be seen from the terms of hypothetical legislation setting out the circumstances of a particular case whether it had a sufficient connection with the subject matter of such a power. However, there would be problems with "purposive" powers, such as the defence power and the "incidental" reach of other powers, since legislation hypothetically limited to particular circumstances would seldom, if ever, show the purpose needed to bring the legislation within such a power.

In any State court or tribunal there would be no demarcation issues if the State legislation gave full effect to the Security Law, thus overlapping the Commonwealth legislation and not merely filling in the gaps left by that legislation. In that event, if a matter fell outside the Commonwealth provisions, it would fall within the State legislation. However, in a federal court there would be demarcation issues, and consequently reading down problems, arising from the constitutional limits on Commonwealth power. Under sub-option (a)(ii)(B) the demarcation issues would arise in both federal and State courts. The complexities of these demarcation issues point strongly against adoption of this sub-option.

Objections to sub-option (a)(i)(B) above – Commonwealth legislation within the most relevant Commonwealth powers

In the States the Commonwealth non-registry provisions could be limited to provisions with respect to subjects, such as banking, foreign, trading or financial corporations, and overseas and interstate trade or commerce, that were thought most relevant to personal property securities.[61]

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[61] Commonwealth provisions could, of course, fully apply in any State that had either given a reference or adopted the Commonwealth provisions if enacted pursuant to a reference from another State.

The problems of jurisdiction and reading down would be similar to those under the previous sub-option. Demarcation issues could be less troublesome in that they would be limited to the selected constitutional powers with respect to (say) banking, corporations (foreign, trading and financial), and overseas and interstate trade and commerce. The legislation would be clearly valid in relation to a wide range of transactions. Nevertheless, the existence of the demarcation issues could make this sub-option troublesome.

Conclusion on Option (3)

The constitutional demarcation issues involved, in varying degrees, in all the sub-options make any versions of this Option unattractive, unless they are considered to be sufficiently offset by the advantages of giving jurisdiction to State tribunals that are not "courts" which would be impossible under Option (1), and giving jurisdiction to federal courts which would be impossible[62] under Option (2).

CONCLUSIONS

Because none of the Options would need to involve any conferral of State functions on a Commonwealth registry, they would not involve the problems created by *Hughes* for the Corporations Law and similar co-operative schemes.

The issues of jurisdiction for federal courts, and State tribunals that are not "courts", might be thought sufficient to justify some version of Option (3), particularly a combination of sub-options (a)(i)(B) and (a)(ii) for the operation of the Security Law in the States.

Subject to that possibility, the best options appear to be the following -

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[62] Apart from the limited jurisdiction within ss 75 and 76 of the Constitution - see above n 38.

Option (1): A single Commonwealth Act applying of its own force in each State (under s 51(xxxvii) of the Constitution pursuant to references from each State) and in each Territory (under s 122 of the Constitution).

Option (2): A co-operative scheme involving only State legislation in the States, and Commonwealth or Territory provisions in each Territory.

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